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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 161

ALBERT SCOLNICK and CELIA SCOLNICK,
*Petitioners,*

*v.*

LOUIS J. LEFKOWITZ and ISADORE SIEGEL,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT.

Albert Scolnick and Celia Scolnick, the petitioners, petition for a writ of certiorari to review the decree of the United States Court of Appeals for the Second Circuit, which affirmed the decision of the District Court, granting summary judgment to respondents Louis J. Lefkowitz, Attorney General of the State of New York and Isadore Siegel, Assistant Attorney General of the State of New York.

### Opinion Below.

The decision of the Court of Appeals was decided March 24, 1964 (Appendix p. A-1).

## Jurisdiction.

The Judgment of the Court of Appeals was entered March 24, 1964. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1) and 42 U. S. C. Sec. 1984.

## Questions Presented.

(a) Whether a state official is immune to prosecution when he goes outside the scope of his duty to commit an illegal act.

(b) Whether summary judgment should be granted a state official, on his sworn statement that he never heard of petitioners, even though petitioners present controverting evidence showing that he must have heard about petitioners and their strong complaint against him.

(c) Whether a federal court should expect conspirators to openly plot in the presence of those they are conspiring against; so that later, in a motion for summary judgment, affidavits can he submitted to the effect that the conspirators had contact with each other and spoke with each other, about those they conspired against.

(d) Whether the 4th and 6th Amendments to the Constitution of the United States apply to the individual states as well as the federal government.

(e) Whether the acts of high officers of the State, acting in their official capacity, fall under the admonition of the 14th Amendment's "No State shall . . ."

## Constitutional Provisions Involved.

The 4th Amendment of the Constitution of the U. S. The right . . . to be secure . . . against unreasonable searches and seizures . . .

The 6th Amendment to the Constitution of the U. S. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Sec. 1, 14th Amendment to the Const. of the U. S. . . . No State shall abridge the privileges or immunities of citizens of the U. S.; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## Federal Statutes Involved.

U. S. C. Title 28, Sec. 1343.
U. S. C. Title 42, Section 1983.

## Statement of the Case.

On March 9, 1962, petitioners sought the official aid of Louis J. Lefkowitz, Attorney General of the State of New York, since there was no other agency to which they could appeal. Petitioners were interviewed by Isadore Siegel, Assistant Attorney General of the State of New York in charge of the Mental Hygiene Bureau of the Department of Law. After conspiring with Dr. Martin Josephson, on the

telephone, to put petitioners in Bellevue Hospital, Mr. Siegel had both petitioners arrested by the New York City Police, who had them simultaneously committed, without good cause and without due process, to the mental wards of Bellevue Hospital, to threaten, injure, oppress and intimidate them.

Action was commenced on May 7, 1963 in United States District Court for the Southern District of New York. Summons and complaint were served upon defendants Justin Winston, Police Commissioner Michael J. Murphy, The City of New York for Department of Hospitals (Bellevue), Dr. Martin M. Josephson, Attorney General Louis J. Lefkowitz and Assistant Attorney General Isadore Siegel.

Jurisdiction: Amendments to the Constitution of the United States, 4th, 6th and Section 1 of the 14th; U. S. C. 28, Section 1343; U. S. C. 42, Section 1985.

On July 16, 1963 C. Metzner, D. J., dismissed defendants Commissioner Murphy and City of New York (Bellevue), but denied Lefkowitz' and Siegel's motion to dismiss. In the same opinion he ruled that the 4th and 6th amendments to the Constitution of the United States could not be basis for relief because these amendments were adopted to secure rights of the people against invasion by the Federal Government; that the 14th Amendment could not be basis for relief since the language of that amendment reads, "No State shall . . .".

On October 7, 1963, petitioners filed Notice of Depositions of defendants and vital witnesses. Lefkowitz and Siegel filed notice on October 17, 1963 for summary judgment and for an order of protection. Six affidavits were submitted by respondents; two of their own and the other four from members of the staff of the Attorney General of the State of New York, Louis J. Lefkowitz.

(1) Respondent Lefkowitz stated that he had never heard of the petitioners prior to summons and complaint on May 7, 1963 and therefore could not have conspired against them.

(2) Miss Helene Manne, a personal secretary to Lefkowitz, stated that she called Isidore Siegel, Assistant Attorney General in charge of the Mental Hygiene Bureau of the Department of Law.

(3) Mr. Isadore Siegel stated that it took him four hours to inform petitioners that there was nothing he could do, and stayed until 7 P. M. on a Friday evening to listen to "their story."

(4) Mr. Samuel A. Hirshowitz, First Assistant Attorney General states that he conferred with Siegel via telephone, during the "interview".

(5) and (6) Lester Esterman and Herbert J. Wallenstein, Assistant Attorneys General stated that they "investigated" the hospital and police station records and attest to the fact "that neither Attorney General Lefkowitz nor Assistant Attorney General Siegel had anything to do with the matters alleged in the complaint."

On November 19, 1963 Thomas J. Murphy. D. J. granted respondents summary judgment because, "The affidavits of Attorney General Lefkowitz and Siegel submitted in support of this motion unequivocally demonstrate that they were not in contact with each other, nor did they talk with each other about the plaintiffs or either of them, and plaintiffs have offered no facts controverting this principal issue as they must do under Rule 56(e)."

Case was appealed to the United States Court of Appeals for the second circuit. On March 20, 1964 case was heard and on March 24, 1964 the Court of Appeals decided "that summary judgment was properly granted."

## Reasons For Granting Writ.

The Court of Appeals has affirmed a decision of the District Court solely on the affidavits of respondents and members of their staff. The court has apparently ignored petitioners' papers showing that (1) Lefkowitz must have heard of petitioners (2) that Siegel and Dr. Josephson conspired to commit petitioners to Bellevue Hospital and (3) that this same Dr. Josephson is in default, in this action, for failure to appear.

The Court of Appeals has affirmed a judgment which is in conflict with recent decisions of this Court. In *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), this Court ruled that the first eight amendments to the Constitution of the United States apply to the individual States as well as to the Federal government.

In *N. Y. Times and Abernathy* v. *Sullivan,* ..... U. S. ..... (March 9, 1964), this Court ruled that it was unimportant who exerted state power, as long as it was exerted.

"The test is not the form in which state power has been applied but, whatever the form, whether such power had in fact been exercised".

## Argument.

Petitioners have shown, through affidavits, a memorandum of law and a "56 page petition" that respondent Lefkowitz's categorical denial of hearing of petitioners, was something that no reasonable minded person could believe, since this 56 page petition was distributed to every United States Senator and Congressman in Washington, D. C. four months prior to summons and complaint. The strong indictment of Louis J. Lefkowitz in this petition is

not vague, and surely its distribution and contents must have been known to respondent Lefkowitz, soon after its distribution.

Petitioners have "set forth specific facts showing that there is a genuine issue for trial" pursuant to Rule 56(e).

By attached affidavit to 56 page petition and discussed in memorandum of law, petitioners complied with 56(e) when they showed that Lefkowitz must have heard of petitioners. Petitioners complied with 56(e) when in their affidavit they showed the overt act of conspiracy between Siegel and Dr. Josephson.

• • • • • •

The affidavits submitted by defendants (respondents) are biased and should be for a jury to decide.

In *Sartor* v. *Arkansas Natural Gas Corp.* (1944), 321 U. S. 620, 627, 64 S. Ct. 724, Justice Jackson stated that affidavits by interested or biased witnesses, if given a trial, would have been for the jury to evaluate. He stated:

> "It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner".

The very essence of a conspiracy is its secrecy and it is not to be expected that conspirators would openly plot in the presence of those they are conspiring against.

> "It is not necessary to prove preliminary meetings of co-conspirators or formal agreements entered into to injure a party in order to establish his criminal conspiracy, and it is sufficient to show common design and concert of action in commission of unlawful acts

> or such facts and circumstances from which it may be inferred that overt acts were in furtherance of a common design." *Hux v. Butler,* 220 F. Supp. 35.

Public officials must be extended much leeway in their actions on behalf of the state, and when they act in the scope of their official duties they *are not* civilly liable. It is presumed that when they act, not for the public good, nor within the scope of their duties they *are* civilly liable.

The 14th Amendment has made the first eight amendments applicable to the States; *Gideon* v. *Wainwright,* 372 U. S. 335.

In *Palko* v. *Connecticut,* 302 U. S. at 324-325, 326 (1937), Mr. Justice Cardozo was careful to emphasize that

> "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, thru the 14th Amendment, becomes valid as against the states", and that guarantees, "in their origin . . . effective against the federal government alone" had by prior cases "been taken over from the earlier articles of the federal bill of rights and brought within the 14th Amendment by a process of absorption." Quoted from *Gideon* v. *Wainwright, supra.*
>
> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the 14th Amendment, and among them the fundamental right of the accused to the aid of counsel in criminal prosecutions." *Grosjian* v. *American Press Co.,* 297 U. S. 233, 243, 244 (1936) quoted from *Gideon* v. *Wainwright.*

Since a State can act only through its officers, agents and elected officials, respondents Lefkowitz and Siegel acted

as the State and fall under the admonition of "No State shall . . . "

In ex-parte Virginia, 100 U. S. 339, the Court stated:

> "The prohibitions of the 14th Amendment are addressed to the States. A constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation *must* act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. . . . We do not perceive how holding an office under a State and claiming to act as the State can relieve the holder from the obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience."

It is respectfully submitted this Court should reverse summary judgment and allow petitioners to proceed with depositions and trial in the District Court, and grant petitioners jurisdiction under the 4th, 6th and 14th Amendments to the Constitution of the United States.

Should the Court reverse summary judgment, petitioners respectfully ask the Court to appoint counsel, which petitioners will pay a reasonable sum for services rendered.

## Conclusion.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Albert Scolnick,
Celia Scolnick,
Petitioners. *Pro Se.*

# APPENDIX.

## Opinion of Court of Appeals.

### UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

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No. 390—September Term, 1963.

(Submitted March 20, 1964 Decided March 24, 1964.)

Docket No. 28684.

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ALBERT SCOLNICK and CELIA SCOLNICK,

Plaintiffs-Appellants,

*v.*

LOUIS J. LEFKOWITZ and ISADORE SIEGEL,

Defendants-Appellees.

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Before:

LUMBARD, Chief Judge, and FRIENDLY and KAUFMAN, Circuit Judges.

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Appeal from judgments of the United States District Court for the Southern District of New York, dismissing plaintiffs' claims based on the Fourth, Sixth and Fourteenth Amendments under Rule 12(b)(6), F. R. Civ. P., Metzner, *J.*, 219 F. Supp. 836 (S. D. N. Y. 1963), and awarding summary judgment to defendants as to plaintiffs' allegations of a conspiracy to violate 42 U. S. C. §1983, Murphy, *J.*

Judgments affirmed.

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ALBERT SCOLNICK and CELIA SCOLNICK, New York, N. Y., *pro se*.

LOUIS J. LEFKOWITZ, New York, N. Y., for defendants-appellees.

PER CURIAM:

Plaintiffs, husband and wife, brought this action against the present appellees and others for an alleged conspiracy to deprive them of their civil rights. Causes of action based on the Fourth, Sixth and Fourteenth Amendments were dismissed as to all defendants by Judge Metzner, pursuant to Rule 12(b)(6), F. R. Civ. P.; and plaintiffs' remaining claim, seeking relief as against defendants Lefkowitz and Siegel under 42 U. S. C. §1983 for a purported conspiracy to incarcerate them in Bellevue Hospital which had not been dismissed by Judge Metzner, subsequently was dismissed by Judge Murphy upon defendants' motion for summary judgment. Rule 56, F. R. Civ. P.

Defendant Lefkowitz is Attorney General, and defendant Siegel, Assistant Attorney General, of the State of New York. Insofar as plaintiffs complain of defendants' failure to investigate and act upon reports of an underworld plot to injure them, the defendants' conduct is clearly privileged as in the exercise of their official, quasi-judicial functions. *Gregoire* v. *Biddle*, 177 F. 2d 579 (1949); see also *Blitz* v. *Boog*, —— F. 2d —— (2d Cir. 1964). While plaintiffs vaguely assert that the defendants departed from the scope of their official duties in a conspiracy to incarcerate them illegally in a mental institution, Judge Murphy's award of summary judgment as to this allegation was clearly proper. Defendants' detailed affidavits, categorically denying the existence of such a conspiracy—and, in the case of defendant Lefkowitz, denying knowledge of the plaintiffs' very existence—were sufficient to require the plaintiffs to "set forth specific facts showing that there is a genuine issue for trial" under the recent amendments to Rule 56(e); this they failed to do. We find that summary judgment was properly granted.

Judgments of dismissal affirmed.